MISSOURI BANKERS ASSOCIATION

Max Cook, President

August 6, 2004

Submitted via E-Mail Attachment

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Comments on Proposed Interagency Guidance on Overdraft Protection Programs

Dear Ms. Johnson:

The Missouri Bankers Association (MBA) is a state bankers association representing the banking industry in Missouri and is composed of about 350 commercial banks and savings and loan associations. The MBA is principally an advocacy association representing these financial institutions before federal and state legislative bodies, federal and state regulators and other parties. This letter is submitted in response to the proposed Interagency Guidance on Overdraft Protection Programs issued by the member agencies of the Federal Depository Institutions Examination Council (" Agencies"). While the Proposal may appropriately addresses some alleged abuses and excesses of some financial service providers in the area of overdraft protection programs, the MBA does have significant concerns with certain parts of the proposed guidance.

Promotion Doesn't Equal Commitment

The Proposal states that overdraft protection programs are solicited to consumers essentially as "*short-term credit facilities*," and normally provide consumers with an express overdraft 'limit' that applies to their accounts, resulting in anything but a discretionary accommodation traditionally provided to those lacking a line of credit or other type of overdraft service. The characterization of the disclosure of the parameters of overdraft protection services as the marketing of "short-term credit facilities" on the basis of the promotion of the service alone is a mischaracterization of discretionary overdraft services. Such services, whether promoted or not promoted, should not be considered "credit facilities." While depository institutions that promote their overdraft protection service may disclose the limit of the service, the disclosure of that

information does not convert a discretionary service to a contractual commitment to pay overdrafts in the future.

The characterization of such services as credit facilities is, of course, appropriate in instances where a financial institution makes a commitment to pay overdrafts in connection with their offer of overdraft protection services. However, the mere disclosure of the dollar limit applicable to overdrafts on a transaction account is not determinative of whether the depository institution has made a commitment to extend credit in the future; and, it is precisely that *commitment* to extend credit in the future that is the defining feature of a "credit facility." We urge the Agencies to avoid any characterization of overdraft protection services as "short-term credit facilities," since we believe that it is unsupportable in light of the discretionary nature of the service. We believe that, to the extent the Agencies are concerned about the effects of the promotion of such services by the disclosure of the available limits, there are adequate alternative remedies available in the event that the manner in which such limits are disclosed is misleading.

Safety & Soundness Considerations

Members of the MBA believe that the 30-day time frame for charge off of an overdraft is too short. It has been the experience of our member institutions that a large majority (90% or greater) of consumers will, within a 45- to 60-day time period, deposit sufficient funds in their transaction account to clear any overdraft created. The 30-day time frame is clearly a "one-size-fits-all" approach that is premature and will result in unnecessary expense to both the depository institution and the consumer. For example, once a transaction account is charged off, the account number is often removed from the system of the institution. If the customer pays the overdraft amount and wishes to reactivate the transaction account, new account documentation usually must be executed, a new account number must be assigned and new checks must be printed for the new account.

In addition, many financial institutions report the charge off of a transaction account to credit bureaus. Implementing the 30-day time frame as *"mandatory"* guidance will create a premature charge off of an overdraft resulting in an adverse affect to the credit history of many consumers.

It has also been the experience of our members that charging off an overdraft dramatically reduces the chances of collection of the overdraft. By the addition of 15-30 days, consumers are provided a greater opportunity to avoid additional costs and negative impact on their credit rating, and depository institutions dramatically increase the likelihood that they will recover on the overdrafts.

We also strongly disagree with reporting the available amount of overdraft protection as an "unused commitment." Discretionary overdraft protection services do not involve agreements or engagements to pay overdrafts at a future date. They are *discretionary* services that are exercised at the sole option of the depository institution. While some institutions may "routinely communicate the available amount of overdraft protection to depositors," the promotional materials that communicate that information generally make clear that payment of any overdraft is purely discretionary, that the depository institution will consider payment of reasonable

overdrafts only as long as the account is in good standing, but that the depository institution has no obligation to pay any item, even if the account is in good standing and even if overdrafts have been paid in the past. It could not be clearer that there is no obligation on the depository institution's part to pay items that create an overdraft on the customer's account.

Thus, while the promotional materials provide more detailed information relating to the criteria considered by a depository institution before paying an overdraft, and may even include the available amount of overdraft protection, the disclosure of that information does not constitute a written agreement to pay overdraft items in the future. It is, rather, merely a restatement of the provisions of the agreement governing the maintenance of the transaction account and the disclosure of the depository institution's policies with respect to the discretionary payment of overdraft items. We submit that the establishment of a limit on the amount of an overdraft a depository institution is willing to permit on a transaction account and the communication of that limit to a consumer is totally irrelevant to the question of whether the limit constitutes an unused commitment that should be reported and subjected to capital standards.

BEST PRACTICES

Marketing and Communications with Customers

Fairly represent overdraft programs and alternatives. The Proposal suggests that, when informing consumers about an overdraft protection services, depository institutions should also inform consumers generally of other available overdraft services or credit products and explain to the consumers the costs and advantages of various alternatives to the overdraft protection service. The Proposal could be read to assume that discretionary overdraft services are automatically disadvantageous for all consumers. This approach ignores the fact that the costs and advantages of various alternatives will depend upon patterns of use and the habits of consumers, which are as varied as the consumers themselves. If other information should be delivered with the information on the overdraft protection service, we believe that it should be factual information versus conjecture. Thus, if comparisons are suggested, a comparison of annual fees, per transaction fees, periodic fees or periodic rates, payment amounts and due dates, *etc.*, would be much more useful to the consumer. Consumers could determine, based on their own anticipated usage or experience, which of the alternatives is most advantageous in their particular circumstance. The MBA does not believe that the Agencies should adopt the Proposal as drafted based on the Agencies' assumptions regarding the relative merits, or demerits, of discretionary overdraft services.

Clearly explain discretionary nature of program. Depository institutions should be encouraged to ensure that their advertising or other materials do not overstate the obligation of the depository institution to pay overdrafts. We believe that the final Interagency Guidance ("Guidance") should stress that, if the depository institution retains the discretion to pay or not to pay overdrafts, consumers should be advised that they may not rely on the fact that the depository institution will pay any item, even if it has done so in the past. The Proposal suggests, however, that a depository institution "describe the circumstances in which the depository institution would refuse to pay an overdraft or otherwise suspend the overdraft protection

program." This implies that all of the circumstances in which the depository institution would take those actions should be described with particularity. If depository institutions are required to be unnecessarily specific, the delineation gives rise to the implication that items will be paid if all of the criteria set forth are met. Because depository institutions retain the discretion to pay or not pay the items, that is simply not the case. If the Agencies are concerned about consumers being misled about overdraft protection services, the Agencies should not require disclosures that may lead to such confusion. Rather, the Agencies should require that depository institutions, make clear that, *even if* certain qualifications are met, *e.g.*, an account meets the depository institution's definition of "good standing," items may still be returned unpaid because the depository institution retains the discretion to do so. The emphasis should be on the discretionary nature of the service, not on disclosing the circumstances in which the discretion will be exercised.

Program Features

Alert customer before a non-check transaction triggers any fees. The Proposal acknowledges that giving prior notice that a given transaction will trigger an overdraft fee is not always feasible and suggests that notices be posted instead. We believe that the Guidance should clarify that there are situations, other than access by an ATM, in which it is not possible to post notices. Even with advances in technology, there may be situations in which it will not be possible to give prior notice, such as with preauthorized automatic debits. We would suggest that the Guidance clearly state that, even though such prior notice is not feasible in those instances, the benefit to consumers in having those items paid rather than returned far outweighs the negative effects of eliminating such transactions from the coverage of an overdraft service simply because no prior notice can be provided.

Promptly notify consumer of overdraft program usage each time used. We question the necessity, utility and feasibility of providing a restatement of overdraft protection policies the first time an overdraft is created. Tracking whether a customer has accessed the overdraft service for the first time seems unnecessarily cumbersome and may not be possible under some systems. Most, if not all, overdraft notices contain all of the information that the Proposal suggests be included in the notice. Restating the terms of the overdraft protection service when the service is accessed for the first time is excessive. We believe that a clear reference to information previously provided and an offer to provide a copy on request should suffice.

The Proposal suggests that, where feasible, the institution should notify consumers in advance if the institution plans to terminate or suspend the consumer's access to the service. Although we are strongly committed to full transparency to the consumer, we urge the Agencies to be more specific with respect to when notification of suspension is suggested. If the Agencies are suggesting that depository institutions notify consumers each and every time the service is unavailable for an account, we are of the view that depository institutions are faced with an

impossible compliance task. An account may not qualify under a system's parameters for a short period of time and may "requalify" a short time later. If no items were presented during that time that would trigger the service, there is no issue of suspension of the service. Thus, the issue of qualification arises only at the time an item is presented for payment against insufficient funds. There is no way to forecast when that may arise. In addition, because "qualification" is fluid, depository institutions could be continually notifying consumers of the suspension and reinstatement of the service. Moreover, by the time notification of suspension or reinstatement is received by the consumer, reinstatement or suspension may have occurred again.

We would also suggest that such notification gives the impression that the service is more like a credit line that the depository institution is obligated to fund rather than a discretionary service. The Agencies have expressed concerns that depository institutions not mislead consumers into thinking that there is a guarantee that items will be paid. It seems that notification that the service is or will be suspended and subsequent notice that it is again available may lead consumers to expect that their items will be honored when in fact they may not be.

Thank you for the opportunity to submit our comments on the Proposal to the Agencies. If we may be of additional assistance, please feel free to contact us.

Sincerely,

Max Cook, President